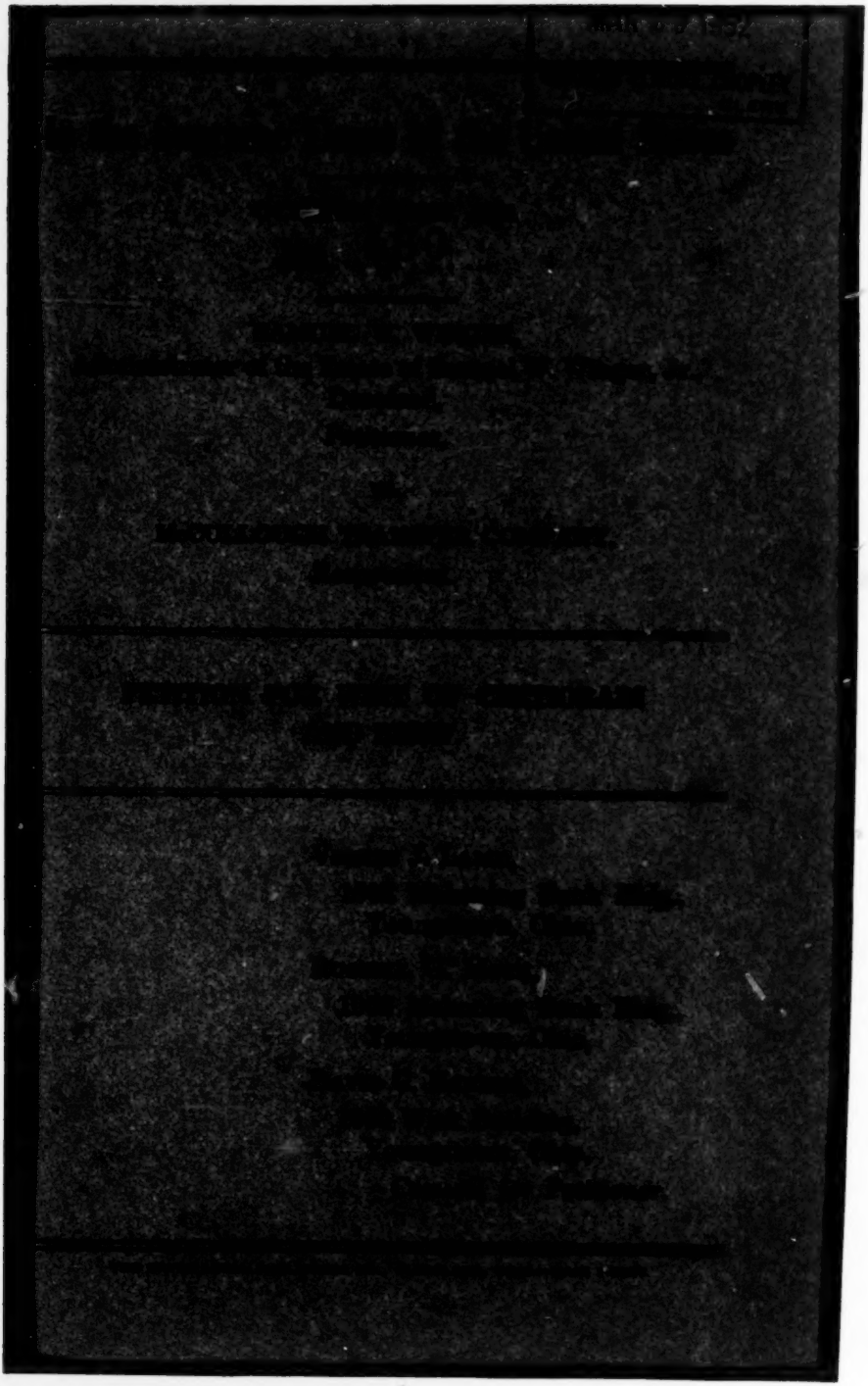

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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. . . . . . .

SAMUEL W. WINGER,
Administrator of the Estate of Samuel W. Winger, Jr.,
Deceased,
Petitioner,

vs.

McCULLOUGH TRANSFER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Your petitioner, Samuel W. Winger, Administrator of the Estate of Samuel W. Winger, Jr., deceased, a citizen of the State of Pennsylvania, respectfully prays for a writ of certiorari herein to review a final judgment of the Court of Appeals of the Seventh Judicial District, Mahoning County, Ohio, being the highest court of said state passing upon the questions involved in the above entitled action, since the Supreme Court of Ohio, under constitutional right of Ohio Constitution, Sections 2 and 4, Article IV, in its discretion refused to certify for review the said record of the Court of Appeals of the Seventh Judicial District, said motion being overruled on the 5th day of De-

cember, 1951, being case No. 32,788 in the Supreme Court of Ohio. A certified transcript of the proceedings is filed herewith. (R., 78 to 89.)

Your petitioner, Samuel W. Winger, Administrator, presents a summary statement of matters involved:

Action in Ohio for wrongful death of a rider in an interstate motor carrier truck who was instantly killed when thrown from the cab of said truck to the highway when the truck collided with another automobile, based in part upon Part 2 of Interstate Commerce Act of February 4, 1887, as amended September 18, 1940, being Title 49, Chapter 8, Sections 301 to 327 inclusive, USCA, and the Administrative Rules and Regulations of the Interstate Commerce Commission establishing the law relative to the operation of motor trucks in interstate commerce under a franchise granted by the Interstate Commerce Commission of the United States. (R., 1 to 3.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The case was tried in the Common Pleas Court of Mahoning County, Ohio, and resulted in a verdict by a jury and a judgment rendered thereon in favor of the petitioner. The respondent (defendant) appealed to the Court of Appeals of the Seventh Judicial District, Mahoning County, Ohio, which reversed said judgment and entered final judgment in favor of the respondent. Petitioner applied to the Ohio Supreme Court for an order to certify the record in the Court of Appeals, which motion was denied. (R., 88.)

(b) The Court of Appeals, Seventh Judicial District of Ohio, failed and refused to apply Part 2 of the Interstate Commerce Act, Title 49, Chapter 8, USCA, and refused to apply the Administrative Rules and Regulations

of the Interstate Commerce Commission pertaining to the operation of interstate motor carriers wherein said statutes and regulations were passed and adopted for the benefit of the traveling public, among them the decedent herein.

(c) The petitioner, by the action of the Court of Appeals in reversing the verdict of the jury and entering final judgment, has been deprived of the due process of law as guaranteed by the Constitution of Ohio and the Constitution of the United States.

(d) The question involved is of great general interest in that transportation by interstate motor trucks of freight and passengers is rapidly developing into a major industry. The public policy therefore requires a pronouncement by this Court of the responsibilities of the franchise holders, otherwise the public is deprived of the safeguards required by the Federal Statutes and the Rules and Regulations of the Interstate Commerce Commission.

(e) A decision by this Court would end the confusion and ramifications now found in the conflict of authority of the several states caused by the plans, subterfuge and schemes to evade the law whether by lease, agency or other device which disguises the true nature of transportation in interstate commerce.

JURISDICTION.

The statutory provision which is relied upon to sustain the jurisdiction of the Supreme Court of the United States is Title 28, Chapter 81, Section 1257 USCA.

Section 1257:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (Adopted June 25, 1948.)

Wherefore petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Court of Appeals, Seventh Judicial District, at Youngstown, Mahoning County, Ohio, commanding said Court to certify and send to this Court a full and complete transcript of the proceedings of the said Court of Appeals had in case No. 3366 and entitled on its docket as follows: Samuel W. Winger, Administrator of the Estate of Samuel W. Winger, Jr., Deceased, plaintiff-appellee, v. McCullough Transfer Company, defendant-appellant.

A copy of the opinion of the Court of Appeals of the Seventh Judicial District of Ohio will be found on pages 85 to 87 of the record, and for convenience is also attached hereto as an appendix.

Respectfully submitted,

VENICE J. LAMB,
RUSSELL G. MOCK,
DAVID C. HAYNES,
Attorneys for Petitioner.

STATE OF OHIO, MAHONING COUNTY, SS.

David C. Haynes, being first duly sworn, says that he is one of the attorneys for the petitioner, Samuel W. Winger, Administrator, of the estate of Samuel W. Winger, Jr., Deceased, and makes this verification duly authorized in the premises for and in his behalf; that he has read the foregoing petition and that the allegations contained therein are true as he verily believes.

DAVID C. HAYNES.

Sworn to before me and subscribed in my presence this 20th day of February, 1952.

JAMES G. NUTH,
Notary Public.
My Commission Expires
November 28, 1954.

(Notarial Seal)

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have assisted in the preparation and have examined the foregoing petition and that in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

DAVID C. HAYNES.

In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. . . . . .

SAMUEL W. WINGER,
Administrator of the Estate of Samuel W. Winger, Jr.,
Deceased,
Petitioner,

vs.

McCULLOUGH TRANSFER COMPANY,
Respondent.

BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

Petitioner, plaintiff below, filed action in the Common Pleas Court of Mahoning County, Ohio, for damages for the wrongful death of Samuel W. Winger, Jr., aged 22. The action was brought for the benefit of his widow and children.

The Respondent, defendant below, was a transportation company operating under the laws of the Public Utilities Commission of the State of Ohio and licensed under the Interstate Commerce Act of the United States to engage in transportation service in five states, including the states of Ohio and Pennsylvania.

Charles Bolton, aged 37, a resident of Pennsylvania, was employed by the respondent corporation to haul coal in his truck from a mine near Grove City, Pennsylvania, to Youngstown, Ohio, for which he received $1.20 per ton. The respondent furnished the State and Federal signs displayed on the truck and had complied with the regulations

in the State of Ohio and was also granted a franchise by the Interstate Commerce Commission. The owner-operator of the truck had been employed in such capacity for about a year prior to the accident. About twenty owners and operators of trucks were employed by the respondent company in a similar capacity.

The day of the accident petitioner's decedent was riding on Bolton's truck at the request of Homer Zook, the foreman and truck dispatcher for the respondent company. A collision occurred betwen Bolton's truck and an automobile on a public highway in Mahoning County, Ohio. The decedent was thrown from the cab of the truck and instantly killed.

The jury trial resulted in a verdict for the petitioner and judgment was entered thereon. Respondent appealed to the Court of Appeals for the Seventh Judicial District of Ohio which reversed the trial court and entered final judgment for the respondent company. A motion to certify the record was requested of the Supreme Court of the State of Ohio. Said Court denied such motion and this petition is now filed for a writ of certiorari. (R., 88.)

SPECIFICATIONS OF ERROR.

1. The Court of Appeals of the Seventh Judicial District of Ohio erred in reversing the Trial Court and entering final judgment against the petitioner.

2. The Court of Appeals of the Seventh Judicial District of Ohio failed to apply Title 49, Sections 301 to 327 inclusive of the Interstate Commerce Act and the Rules and Regulations of the Interstate Commerce Commission adopted pursuant thereto.

3. The petitioner was denied due process of law as afforded by the Constitution of the State of Ohio and the Constitution of the United States.

ARGUMENT AND LAW.

Charles Bolton, the owner-driver of the truck employed by the respondent did not have a permit to operate in interstate commerce, nor had he qualified to operate under the laws of the Public Utilities Commission of the State of Ohio. The respondent corporation had been granted a franchise by the Interstate Commerce Commission of the United States and had complied with the regulations of the Public Utilities Commission of the State of Ohio. The necessary identifications were carried on Bolton's truck during the transportation service.

Counsel for the petitioner contends that the relationship between the owner-driver of the truck and the respondent corporation is fixed by the federal statutes as well as by the rules and regulations of the Interstate Commerce Commission. The Court of Appeals of the Seventh Judicial District of Ohio in failing to apply the Federal law and the rules of the Commission committed error prejudicial to the rights of said petitioner. Title 49, Section 8, Sections 301-327 USCA, Part 2, Motor Carriers Act as amended September 18, 1940, established the law in regard to the operation of motor trucks under a permit issued by the Interstate Commerce Commission.

Title 49, Section 302, USCA—Application of Provisions:

> "(a) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission."

Title 49, Section 315, USCA, fixes the liability for bodily injury and loss of life or for loss or damage to property of others, as follows:

Section 315. Security for Protection of Public:

"No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. * * *"

Title 49, Section 324, USCA. Identification Plates for Interstate Motor Carriers:

"The Commission is authorized, under such rules and regulations as it shall prescribe, to require the display of suitable identification plate or plates, upon any motor vehicle used in transportation subject to any of the provisions of this chapter, to provide for the issuance of such plates, and to receive the payment by such carriers of the reasonable cost thereof. All moneys so collected shall be paid into the Treasury of the United States. Any substitution, transfer, or use of any such identification plate or plates, except such as may be duly authorized by the Commission, is prohibited and shall be unlawful."

Pursuant to Section 325, *supra,* effective September 1, 1947, the Interstate Commerce Commission enacted the

following rules and regulations as to the display of certificates by motor carriers.

"166.1. Vehicles subject to regulations.

Every for-hire motor carrier operating under authority granted pursuant to the Interstate Commerce Act (24 Stat. 379, as amended; 49 U. S. C. 1 et seq.) shall observe the rules and regulations prescribed in this part respecting each motor vehicle operating under such authority."

"166.2. Method of Identification.

There shall be displayed on both sides of each vehicle operated under its own power, either alone or in combination, except as otherwise provided in this part respecting vehicles in driveaway service, the name or trade name, of the motor carrier under whose authority the vehicle or vehicles is or are being operated, and the certificate, permit or docket number assigned to such operating authority by the Interstate Commerce Commission. Such certificate, permit, or docket number or numbers, shall be in the following form: 'I. C. C. _____,' but shall not include any sub numbers which may have been assigned. If the name of any persons other than the operating carrier appears on the vehicle operated under its own power, either alone or in combination, the name of the operating carrier shall be followed by the information required above, and be preceded by the words, 'Operated by.' Nothing in the regulations in this part shall prohibit display of such additional identification as is not inconsistent herewith."

In *Brown, Admx., v. L. H. Bottoms Truck Lines, Inc.*, 227 N. C. 299, 42 S. E. 2d 71, the Court clearly sets forth the purpose and intent of the Federal Statutes regulating interstate truck carriers and the necessity and reason for

requiring such carriers or anyone operating under them to display identification plates. At page 74 the Court said:

> "(5-8) * * * Under the Federal statute the defendant was required to attach to each vehicle used in such transportation the identification or license plates prescribed for it by the Commission. 49 U. S. C. A. 324. In order to augment its equipment for the transportation of goods, the defendant obtained by contract the use of Brown's owner-driven truck to be added to its own fleet of trucks for the transportation of certain goods from High Point, Carolina, to Norfolk, Virginia, and in the contract it was stipulated, in accordance with the requirements of the statute and the regulations of the Interstate Commerce Commission, that the license plates issued by the Commission to the defendant Truck Lines for its own trucks must be attached to and used by the Brown truck, thus identifying the truck as being used by the named defendant under its franchise. The Brown truck could not have been driven over the highways to Virginia in interstate commerce without being thus identified. It could not have been used independently or in any other way for this interstate transportation. The truck for the period of transportation was in the possession of defendant Truck Lines, and only at the end of the journey was it to be delivered back to lessor * * *."

In the case at bar the respondent company was carrying on the business under a franchise granted by public authority and cannot by this privilege bestowed upon it escape or relieve itself from liability for acts of negligence resulting in injury or death to third persons by delegating its duties to independent contractors, corporations, agents, servants or individuals.

In *Venuto v. Robinson, et al.*, 118 Fed. 2d 679, it was held that the motor carrier company operating under a

franchise was liable for the negligent acts of an independent contractor who was engaged to haul between points in North Carolina and New England, and at page 682 the Court said:

> "The rule is stated in the Restatement of Torts, Par. 428: 'An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.' "
>
> "* * * The carriage of freight in high powered motor vehicles on public highways is certainly business attended with very considerable risk. The rule stated has been applied in cases against railroads to hold a lessor railroad liable even where the relationship has been lessor and lessee without even general control or direction by the lessor over the lessee. See annotation, 28 A. L. R. 122, and following. The application to one employed by a common carrier by motor truck upon the public highways is an even clearer case. See Duncan v. Evans, 134 Ohio State 486, 17 N. E. 2d 913."

See also *Hodges, et al., v. Johnson, et al.*, 52 Fed. Sup. 488, wherein it was held that an operator of an empty truck returning from his original mission, that the return trip as well as the mission to Roanoke, Virginia, from Charlotte, North Carolina, was a necessary part of the same trip and was a part of the entire undertaking and was all operated under the order of the franchise carrier.

It is the contention of counsel that the case at bar is controlled by federal laws and regulations regarding motor carriers. Nevertheless in the State of Ohio, by reason of Section 614-115 of the General Code, the liability for acts of negligence resulting in injury or death

to third persons is similar to Section 315, Title 49, U. S. C. A.

Pursuant to the Federal Statutes, the Interstate Commerce in enacting rules which have been referred to above, adopted Rule No. 4, of August 19, 1936, under Section 208-A of the Interstate Commerce Act, as follows:

> "Q. Under what circumstances may a carrier add to its equipment by leasing a vehicle and obtaining the service of its owner-driver?
>
> "A. The lease or other arrangement by which the equipment of an authorized operator is augmented, must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such way as to be good against all the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; and that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

The certificate of public convenience and necessity issued by the Interstate Commerce Commission to the respondent therefore made it mandatory that by augmenting the equipment of Bolton the respondent corporation stood in the relationship of master and servant and Bolton's truck was taken by the McCullough Transfer Company as its own equipment against the whole world. The petitioner's decedent was not employed by Bolton or the McCullough Transfer Company but was riding upon said truck at the request of Homer Zook, the truck dispatcher. The trial jury found by a special interrogatory submitted by the respondent that the petitioner's decedent was riding upon the Bolton truck as a helper to Bolton, as suggested by Homer Zook.

It is therefore apparent the jury found under the evidence that peitioner's decedent was placed upon said truck and was riding thereon at the time of the collision by an employe of the respondent company with his consent and approval. Therefore counsel contends that any negligence upon the part of Bolton causing injury or death is a question to be submitted to a jury. The action of the Court of Appeals in reversing said verdict and judgment denied due process of law to the petitioner.

In *U. S. v. La Tuff Transfer Service*, U. S. District Court, Minnesota, Third Division, 95 Fed. Supp. 375, at page 379:

> "A common carrier by motor vehicle is prohibited from engaging in interstate commerce unless there is in force a certificate of public convenience and necessity from the Commission authorizing such operations, 49 U. S. C. A. 306(a)."
>
> "The 'services' and 'transportation' to which this part applies are defined, 49 U. S. C. A. 303 (a) (19), as follows: 'The services and transportation to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.' "

And at page 380:

> "In determining the status of a lessor of motor equipment when vehicles are used by a shipper, the courts have disregarded form, and look only to the substance. As stated by the Circuit Court of Appeals in Georgia Truck System v. Interstate Commerce Commission, 5 Cir., 123 Fed. 2d, 210, 212: '* * * though its (lessors) operations have been to some extent in-

vested with the form of a renting or hiring business, this investiture is but a device or subterfuge behind and under which appellant, in substance and in reality, operates a transportation business. * * * In the argument much refinement was indulged in, much speculation was raised, many authorities cited, as to how close one might approach the line of transportation without being regarded as having stepped over it. We need not indulge here in any of these refinements. It is sufficient for us to say that the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire * * *' "

And at page 381:

"Motor carrier operations must be bona fide and conducted in good faith, without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. Any plan or scheme, whether by purported lease, agency, or other device disguising the true nature of the transportation will be of no avail for that purpose. Where one's object in the transportation of property on public highways is to earn compensation for the use of his equipment and his services, he cannot evade regulation by execution of leases or other agreements which purport to give the alleged lessee the status of a private carrier. Interstate Commerce Commission v. Isner, 92 Fed. Supp. 582, 583; Interstate Commerce Commission v. F. & F. Truck Leasing Company, D. C., 78 Fed. Supp. 13; Georgia Truck System v. I. C. C., 5 Cir., 123 Fed. 2d 210; Interstate Commerce Commission v. Pickard, D. C., 42 Fed. Supp. 351; John J. Casale, Inc., Contract Carrier Application, 44 M. C. C. 45, 49 M. C. C. 15; and Bridge Auto Renting Corporation v. Pedrick, 2 Cir., 174 Fed. 2d 733."

And at page 383:

> "In a well considered case, Wagner v. Larsen, 174 Wis. 26, 182 N. W. 336, 337, the law is stated thus:
>
> 'Where an owner hires his team and driver, or his automobile and chauffeur, or his machine and operator to another to do work to be designated and as directed by the hirer, the hirer having no authority by the terms of the contract of hire to discharge the driver, chauffeur, or operator, and substitute another, the driver, chauffeur, or operator remains the servant of the owner in matters relating to the safety and management of the team, automobile, or machine, and the owner is liable to third persons for damages resulting from the negligent management or operation of the team, automobile, or machine by such servant.
>
> 'The reason is that the hiring is not of the team distinct from the driver or of the driver distinct from the team, but is the hiring of the entity composed of the two. While the hirer acquires dominion or authority over the entity to designate the work that shall be done and direct the manner of doing it, he acquires no authority to direct how the team shall be driven, managed, or cared for, nor can he divide the entity by separating the driver from the team. He may dispense with the services of the entity—the driver and the team—but he cannot discharge the driver and substitute another.' "

In the case at bar Charles Bolton, the owner-operator, was employed exclusively by the respondent corporation. He was personally licensed by and through the McCullough Transfer Company to drive a motor vehicle in interstate commerce, complying with the rules and regulations of all interstate drivers of motor carriers. The petitioner's decedent was not employed in any manner nor licensed in any way to operate a motor vehicle in

interstate commerce. The sole question is to determine the legal relationship existing between the owner-operator of the truck and the respondent corporation, in view of the Federal Statutes, Title 49, Chapter 8, Sections 301 to 327 inclusive, and the Rules and Regulations of the Interstate Commerce Commission.

The judgment of the Court of Appeals of the Seventh Judicial District of Ohio, being the highest court of said State passing upon the case at bar, ignored and refused to apply the Federal Statutes and rules and regulations adopted by the Interstate Commerce Commission. The petitioner feels he is entitled to a writ of certiorari since he has been denied due process of law.

This case presents a question of great and general interest because this Court has not passed upon the question. A pronouncement by the Supreme Court of the United States will establish a rule of uniformity for the courts to follow in this important branch of present day transportation.

Respectfully submitted,

RUSSELL G. MOCK,
VENICE J. LAMB,
DAVID C. HAYNES,
Attorneys for Petitioner.

APPENDIX.

Opinion of the Court of Appeals.

IN THE COURT OF APPEALS.

STATE OF OHIO, MAHONING COUNTY,
SEVENTH DISTRICT.

SAMUEL W. WINGER,
Administrator of the Estate of
Samuel W. Winger, Jr., Deceased,
Plaintiff-Appellee,

VS.

McCULLOUGH TRANSFER COMPANY,
Defendant-Appellant.

OPINION.
Case No. 3366.

APPEARANCES.

Russell G. Mock, Youngstown, Ohio, *for Plaintiff-Appellee.*
William E. Pfau, Youngstown, Ohio, *for Defendant-Appellant.*

HON. JOHN C. NICHOLS,
HON. LYNN B. GRIFFITH,
HON. ELMER T. PHILLIPS, *JJ.*

Dated: June 1, 1951.

PER CURIAM.

Homer Zook, the authorized agent of the defendant, requested Samuel Winger, Jr., to drive Bolton's truck from the mine at Grove City, Pennsylvania, to the scales

situated at the Rod and Wire Department of the Youngstown Sheet and Tube Company at Struthers, Ohio, and thence back to Bolton's home at Sharpsville. Winger drove it to the scales and from there on Bolton took the wheel and drove the truck.

The defendant, McCullough Transfer Company, is not answerable in damages unless Samuel Winger, Jr., at the time of the accident was acting for McCullough in the prosecution of its business.

The principal is only bound by the authorized acts of his agent, and the power of the agent to charge his principal must be traced directly to his authority. Winger was placed at the wheel of this truck at Grove City because Bolton was intoxicated. He was to drive it to Struthers and after unloading the coal he was to drive it back to Sharpsville. Winger abandoned the mission of his agency at Struthers and Bolton drove it from there on to the scene of the accident. This conduct on the part of Winger violated the purpose of his presence on the truck as well as the specific instructions of Zook. Had Winger been at the wheel at the time of the accident then an entirely different situation presents itself.

Upon this particular trip Bolton had been refused the right to drive the truck in the business of the McCullough Transfer Company and Winger had been given that authority. Winger had no right or power to transfer his authority back to Bolton in Bolton's drunken condition.

Zook entrusted the operation of the truck to Winger, but Winger changed his status at Struthers from that of a driver to one of a rider. At Struthers he ceased to act for McCullough. He repudiated his mission and failed, or refused, to exercise the duty entrusted to him at the mines. He defaulted in this duty. When Winger permitted Bolton

to take the wheel at Struthers he did an act outside the scope of his employment, for which the defendant is not responsible.

The judgment of the Court of Common Pleas is reversed because contrary to law.

Now coming to enter the judgment which the trial judge should have entered final judgment is rendered for the defendant, McCullough Transfer Company.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 680

SAMUEL W. WINGER, Administrator of the Estate of Samual W. Winger, Jr., Deceased, *Petitioner,*

v.

McCULLOUGH TRANSFER COMPANY, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HISTORY

The petitioner recovered a judgment in the Common Pleas Court of Mahoning County, Ohio, in the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00). The Court of Appeals of the Seventh District of the State of Ohio rendered final judgment for the respondent. The petitioner filed a motion to certify in the Supreme Court of Ohio which motion was denied and the Supreme Court of Ohio made the following entry in the case reported in *156 Ohio St., at Page 394:*

> "It is ordered and adjudged, sua sponte, that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved."

The petitioner has now filed a petition for a writ of certiorari in this Honorable Court.

STATEMENT OF FACTS

The McCullough Transfer Company was engaged in hauling coal from two mines in Pennsylvania to plants of The Youngstown Sheet & Tube Company in the Youngstown, Ohio district. They engaged fifteen to twenty coal dump truck owners to haul this coal from these strip mines on a tonnage basis. Some of the truck owners lived in Ohio and some in Pennsylvania. Each owner maintained his own truck. The McCullough Transfer Company was a duly licensed P.U.C.O. and I.C.C. carrier.

On Friday, January 16th, 1948, Charles Bolton was so engaged in the hauling of coal with his Mack dump truck from a mine of The Buckeye Coal Company operated by the Interstate Construction Company near Grove City, Pennsylvania, to the Rod and Wire Plant of The Youngstown Sheet & Tube Company at Struthers, Ohio, a distance of between thirty and thirty-five miles. He was paid $1.20 per ton for coal so hauled. There was no written lease or other arrangement for pay except the $1.20 per ton. He was furnished with a P.U.C.O. and I.C.C. permit of the McCullough Transfer Company. He had no permits of his own. There was no restriction against Bolton's hauling for others if he so desired.

Between three and four o'clock on the afternoon of that day he got his last load at the mine where Samuel Winger, (the father of Samuel Winger, Jr., the de-

cedent), worked as a loader and Samuel W. Winger, Jr., as the oiler, and Bolton's truck was driven to the office of the mine, about a half mile from the pit where the truck was loaded. His truck was the last truck loaded that day and the mine closed until the following Monday.

As Bolton appeared at the office it was apparent that he was intoxicated and unfit to drive his truck. Homer Zook, a dispatcher and employee of the McCullough Transfer Company, was at the office of the mine and would not permit Bolton to continue driving his truck. At that time Samuel W. Winger, Samuel W. Winger, Jr., Homer Zook, Bolton, Joseph Ketler, a mine worker, and another broker, John Edwards, were present. Samuel Winger and Ketler testified that Zook requested that Samuel W. Winger, Jr. drive Bolton's truck. Both John Edwards and Homer Zook testified that Samuel W. Winger, Jr. volunteered to drive Bolton's truck. In any event, with Zook's consent, without anything said about pay, Samuel W. Winger, Jr. left the office of the mine driving Bolton's truck, Bolton sitting on the front seat of it. Edwards, the other broker, with a load proceeded on ahead of Bolton's truck.

When they got to the Rod and Wire Plant of The Youngstown Sheet & Tube Company at Struthers between five and six o'clock, Samuel W. Winger, Jr. relinquished the wheel and Bolton drove his truck into the plant where it was unloaded.

Bolton, Samuel W. Winger, Jr. and Edwards had some conversation there and these three men then proceeded out of the plant of The Youngstown Sheet & Tube Company where they turned left, or west, and traveled about a mile to Campbell where they stopped at the Gridiron Cafe.

Bolton drove his own truck to this cafe with Samuel W. Winger, Jr. riding with him and Edwards drove his own

truck. They stayed at the Gridiron for about a half hour, had some drinks and then started for home, Bolton insisted upon driving. Edwards lived in New Castle; Bolton at Sharpsville. Edwards drove ahead. Bolton followed. They reached Route #422, drove east on Route #422 and when Bolton arrived at Coitsville where the Coitsville-Hubbard Road intersects Route #422, Bolton attempted to make a left turn in front of a west bound automobile with which he collided. Samuel W. Winger, Jr. was thrown out of the truck and received injuries which resulted in his death.

The accident happened around seven o'clock in the evening at a point three or four miles from the plant where the coal was delivered and after the driver had made a detour for a mile to a cafe. At the time the accident happened the truck still bore the P.U.C.O. and I.C.C. permits of the McCullough Transfer Company.

At the time the accident happened Bolton was turning from the road that would lead back to the mine onto a road which would take him to his home in Sharpsville.

The coal was weighed outside the mill, a copy of the weigh bill was furnished the Accounting Department of The Youngstown Sheet & Tube Company from which a freight manifest was prepared and delivered to the McCullough Transfer Company to enable the McCullough Transfer Company to bill The Youngstown Sheet & Tube Company and to pay the truck owner. The truck owner, or driver, also retained a copy of this ticket or weigh bill to enable him to check and see that he received full payment for the coal which he hauled,—this copy he might turn in later at the mine or to the McCullough Transfer Company.

ARGUMENT

First: An Individual Owner of a Truck Is An Independent Contractor When Operating Under the Franchise Permits of a Motor Vehicle Carrier

Harrison v. *Greyvan Lines, Inc.*, (C.C.A., 7), 156 F. (2d), 412, 331 U. S., 704, 722) 91 L. Ed., 1757, 1764, Opinion delivered by Mr. Justice Reed

"There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. . . .

". . .

"These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.

". . .

". . . we agree with the decision below . . . that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the con-

trol exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

Behner v. *Industrial Commission of Ohio, 154 Ohio St., 433; 96 N. E. (2d), 403,* cites and follows with approval the foregoing decision of the Supreme Court of the United States.

Second: A Motor Vehicle Carrier is Only Responsible for the Acts of Such Broker-Independent Contractor While He is Engaged in Motor Transportation Service for Such Carrier

Duncan v. *Evans,* 135 Ohio St., 486; 17 N. E. (2d), 913

"Apparently the legislature (of Ohio) intended to protect the public against loss from negligence on the part of any one using the highway in the business of transportation by motor truck."

Simon v. *McCullough Transfer Company,* 155 Ohio St., 104 at 110; 98 N. E. (2d), 19 a

Third: An Individual Owner of a Truck Hired to Haul Coal for a Motor Carrier From a Mine to a Mill on a Tonnage Basis is Not Engaged in Motor Transportation Service for the Carrier While Driving His Truck From His Home to and From His Place of Employment

It should be noted that a companion case brought by a member of the public against this respondent arising out of this same accident was decided by the Supreme Court of Ohio. It is the case of *Simon* v. *McCullough Transfer Co., supra.*

SYLLABUS:

"A common carrier of freight by motor vehicle, who possesses a certificate issued under Part II of the Interstate Commerce Act and employs an independent contractor, who does not possess such a certificate, to transport interstate freight in such independent contractor's truck carrying the permit plates of the common carrier, is not liable for an accident caused by the negligence of the independent contractor driving his own truck where, at the time of such accident, the independent contractor had entirely completed the transportation for the common carrier, had no further obligation or duty toward such common carrier and was driving the empty vehicle entirely under his own direction and control at a point distant from the location where he had completely unloaded the freight which he had been hired to transport."

Costello, Admx. v. *Smith,* 7 Federal Carriers Cases, 2272, decided January 19, 1950; 179 Fed. Rep. 2d, 715

Fourth: The Individual Owner of a Truck is a Private Carrier as Defined by the Federal Statutes and Subject to the Act Only With Respect to Safety of Operations, Hours of Service of Employees and Standards of Equipment

Costello, Admx. v. *Smith, supra*

We respectfully direct the court's attention to the facts in the instant case as set forth in the opinion of the Court of Appeals of the Seventh District of Ohio, and as further related in detail in the companion case of *Simon* v. *McCullough Transfer Co., supra.*

We further submit to the court the opinion and decision of the Court of Appeals of the Seventh District of Ohio in the instant case, and also the finding and opinion of this Honorable Court in the case of *Harrison* v. *Greyvan*

Lines, Inc., supra, and also the decisions of the courts in the cases of *Costello, Admx.* v. *Smith* and *Simon* v. *McCullough Transfer Co.,* supra.

The legal status of the decedent on the broker's truck at the time of the accident could not be higher than an invitee to whom ordinary care would be owed, but the Ohio Supreme Court held that the respondent was not responsible in this accident to a member of the public to whom the same duty was owed. *Simon* v. *McCullough Transfer Co., supra.*

Assuming that the decedent was placed on the broker's truck by a duly authorized employee of the respondent to drive the truck because the regular driver and owner was intoxicated, the decedent lost any right which he might have had to be on the truck at the time of the accident when he relinquished the wheel of the truck to the intoxicated owner, abandoned his job and departed from his agency. See Opinion of the Court of Appeals of the Seventh District of Ohio.

The foregoing clearly shows that there is no liability upon a motor carrier for the operation of the truck of an individual owner when his work is completed for the carrier and he is engaged in driving his truck to his own home. And further, that there is no Federal or State statute nor any ruling of the Interstate Commerce Commission placing liability upon a motor carrier for such operation of a truck by an individual owner thereof.

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari filed by the petitioner herein should be denied.

Respectfully submitted,

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